

ELECTRONICALLY FILED

May 2, 2006

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 Pleading

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:)	BK-S-06-10725-LBR
USA COMMERCIAL MORTGAGE COMPANY)	Chapter 11
Debtor.)	

In re:)	BK-S-06-10726-LBR
USA CAPITAL REALTY ADVISORS,)	Chapter 11
LLC,)	
Debtor.)	

In re:)	BK-S-06-10727-LBR
USA CAPITAL DIVERSIFIED TRUST)	Chapter 11
DEED FUND, LLC,)	
Debtor)	

In re:)	BK-S-06-10728-LBR
USA CAPITAL FIRST TRUST DEED)	Chapter 11
FUND, LLC,)	
Debtor)	

In re:)	BK-S-06-10729-LBR
USA SECURITIES, LLC,)	Chapter 11
Debtor)	

Affects:

- ☒ All Debtors
- ☐ USA Commercial Mortgage Co.
- ☐ USA Securities, LLC
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed
- ☐ USA First Trust Deed Fund, LLC

**LIMITED OPPOSITION TO THE
DEBTORS' CASH MANAGEMENT
MOTION AND INTERIM USE OF CASH**

Date: May 3, 2006

Time: 9:30 a.m.

Place: Foley Federal Bldg.
300 Las Vegas Blvd. S.
Las Vegas, NV 89101

1 **TO THE HONORABLE LINDA B. RIEGLE, UNITED STATES BANKRUPTCY JUDGE:**

2 In response to the "Motion For Order Under 11 U.S.C.
3 §§105(A), 345, And 363 Approving Debtors' Proposed Cash
4 Management Procedures And Interim Use Of Cash In Accordance With
5 Proposed Cash Budget" (the "Cash Management Motion")¹, filed by
6 USA Commercial Mortgage Company ("USACM"), on behalf of itself
7 and its affiliated debtors (each, a "Debtor" and, collectively,
8 the "Debtors"), an organized group of investors, who each have
9 done business with one or more of the Debtors (the "Interim
10 Committee"), hereby files this limited opposition ("Limited
11 Opposition") and states as follows:

12
13 **A. Until An Official Committee Has Been Appointed, The
Debtors' Use Of Cash Should Be Strictly Limited.**

14 Having received interim approval to implement their
15 cash management system through May 3, 2006, the Debtors now seek
16 final approval of their cash management system until July 15,
17 2006. Essentially, the Debtors are making this request in a
18 vacuum, where no independent third party has been able to
19 perform any due diligence and virtually no information has been
20 filed with the Court or even been made available to creditors or
21 investors. Indeed, the Debtors are simultaneously requesting a
22 forty-five (45) day extension of the filing of their Schedules
23 of Assets and Liabilities. The issues relating to the extended
24 use of cash are particularly troubling in light of the fact that
25 no official investors' committee or creditors' committee has
26 been appointed in these cases.

27
28 ¹ Terms not otherwise defined herein shall have the same meanings
ascribed to them in the Cash Management Motion.

1 In the upcoming weeks, the Debtors' Budget reflects
2 certain receipts and disbursements that raise particular
3 concern. For example, in the week ending May 6, 2006, the
4 Debtors anticipate spending \$250,000 in legal fees and expenses
5 in connection with post-petition financing. As the Debtors have
6 yet to file any motion to seek approval of post-petition
7 financing, it is premature to have the Court approve the payment
8 of any such fees and these fees should not be approved.
9 Further, the Debtors' Budget contemplates accruals of
10 significant fees and expenses for legal and financial advisory
11 services for the Debtors' estates. Once again, it is simply too
12 early in these cases to determine whether these amounts are
13 appropriate and whether the Debtors should be authorized to
14 expend such funds.

15 Of the greatest concern, however, is the fact that the
16 Debtors anticipate collecting more than \$11.5 million during the
17 week ending May 13, 2006, in connection with estimated receipts
18 of interest and principal on outstanding loans from third party
19 borrowers. Currently, the ownership of these funds is disputed
20 - does this money belong the Debtors' estates or their investors
21 or do the investors have a partial interest in such funds? If
22 this money belongs to the Debtors' investors, which investors or
23 group of investors does it belong to? These and other questions
24 make clear that an independent voice is needed in these
25 proceedings, and that the appointment of an official investors'
26 committee must occur before significant expenditures of funds in
27 the possession of the Debtors' estates are made for any purpose.

28 Therefore, the Interim Committee requests that the

1 Debtors' use of cash, pursuant to the proposed Budget (as
2 modified by the objections made herein), be limited solely
3 through the end of May 13, 2006, and solely to the extent
4 necessary to avoid immediate and irreparable harm to the
5 portfolio of mortgage loans and the Debtors' estates pending a
6 final hearing, with all of the investors' rights reserved to
7 object to any further use of cash. By that date, it is
8 anticipated that an official investors' committee will be
9 appointed. Such a committee can commence its investigation to
10 determine whether these collections and the funds that were in
11 the Debtors' accounts on the petition date are property of the
12 Debtors' estates. The committee can also then discuss with the
13 Debtors the nature and necessity of the Debtors' proposed
14 expenditures to facilitate further negotiations regarding a
15 longer term agreement regarding the Debtors' continued use of
16 cash, if and to the extent appropriate.

17 **B. To The Extent That Investors Have Interests In The**
18 **Debtors' Funds, Investors Should Be Granted**
19 **Adequate Protection.**

20 The Debtors have not provided any information
21 regarding the source of cash that they seek to spend, nor have
22 the Debtors even acknowledged that the money may constitute cash
23 collateral under section 363(a) of the Bankruptcy Code, subject
24 to the interests of one or more investors. Under these
25 circumstances, authority to use any significant amount of cash
26 should not be granted unless and until the Debtors meet their
27 burden of showing that investors' interests in the cash
28 collateral to be spent are subject to adequate protection. See,

1 e.g., 11 U.S. C. § 363(p)(1) (trustee has the burden of proof on
2 the issue of adequate protection); Perrott v. Johnston (In re
3 Johnston), 31 B.R. 202, 205 (Bankr. D. Vt. 1983) ("At the
4 hearing the Debtor offered no testimony as to how she was going
5 to furnish adequate protection and, in the absence of such
6 proof, she has not sustained the burden required by her under
7 Section 362(g) of the Code.").

8
9 While it is up to the Debtors to propose the method of
10 providing adequate protection, there may be several means by
11 which investors can be protected to the extent that the Debtors
12 use investors' cash collateral.

13 First, the Bankruptcy Code expressly provides that the
14 granting of a replacement lien is a means of adequate
15 protection. See 11 U.S.C. § 361(2). The Debtors could condition
16 their continued use of funds, on the granting of replacement
17 liens to the Debtors' investors to the extent that the Debtors'
18 use of funds results in any impairment, on or after the petition
19 date, in the investors' interest in such funds as of the
20 petition date. Such replacement liens would not adversely
21 affect the Debtors and would ensure that the Debtors' investors
22 receive full protection of their interests, if any, in these
23 funds.

24 Second, the Debtors, pursuant to Bankruptcy Code
25 507(b), could also recognize a super-priority claim of any such
26 investors. Specifically, Bankruptcy Code section 507(b)
27 provides as follows:

28 If the trustee, under section 362, 363, or 364
of this title, provides adequate protection of

1 the interest of a holder of a claim secured by
2 a lien on property of the debtor and if,
3 notwithstanding such protection, such creditor
4 has a claim allowable under subsection (a)(1)
5 of this section arising from the stay of
6 action against such property under section 362
7 of this title, from the use, sale or lease of
8 such property under section 363 of this title,
9 or from the granting of a lien under 364(d) of
10 this title, then such creditor's claim under
11 such subsection shall have priority over every
12 other claim under such subsection.

13 11 U.S.C. §507(b) (emphasis added).

14 Finally, as further adequate protection, the Debtors
15 could provide their investors access to the Debtors' books and
16 records to ensure that the Debtors are obtaining cash receipts
17 and making disbursements in accordance with their Budget.

18 **WHEREFORE,** the Interim Committee respectfully requests
19 that the Court (i) limit the use of cash proposed in the
20 Debtors' Cash Management Motion as set forth herein, (ii)
21 prohibit the Debtors from making any disbursements with respect
22 to legal counsel fees and expenses related to post-petition
23 financing absent a further Court order, (iii) withhold approval
24 of the accrued professional fees and expenses set forth in the
25 Budget, (iv) limit the duration of the Debtors' use of cash,
26 pursuant to their proposed Budget (as modified herein), only
27 through May 13, 2006, with all rights of the Debtors' investors
28 reserved with respect to any further use of cash, and (v) grant
such other relief as may be necessary or appropriate.

1 Respectfully submitted this 2nd day of May, 2006.

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4 /s/ Eve H. Karasik

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COUNSEL FOR THE INTERIM COMMITTEE
OF CONCERNED INVESTORS